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IN THE

Supreme Court of the United States

October Term, 1949

No. 40 **40**

UNITED STATES OF AMERICA, *et al.*

v.

CAPITAL TRANSIT COMPANY, *et al.*

No. 41 **41**

WASHINGTON, VIRGINIA & MARYLAND COACH COMPANY, INC., ET AL.

v.

CAPITAL TRANSIT COMPANY, *et al.*

Appeals From the United States District Court for the District of Columbia.

PETITION FOR RE-HEARING.

EDMUND L. JONES,
F. G. AWALT,
SAMUEL O. CLARK, JR.,
DARYAL A. MYSE,
Attorneys for Appellee, Capital Transit Company.

November, 1949.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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No. 40

UNITED STATES OF AMERICA, *et al.*

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No. 41

WASHINGTON, VIRGINIA & MARYLAND COACH COMPANY, INC., ET AL.

v.

CAPITAL TRANSIT COMPANY, *et al.*

Appeals From the United States District Court for the District of Columbia.

PETITION FOR RE-HEARING.

The Appellee, Capital Transit Company, respectfully petitions the Court to grant a rehearing in the above-entitled cases and, in support thereof, shows to the Court:

1. The instant cases, as presented to this Court, involved a number of independent issues. Of these, two were of

paramount and essentially equal importance. The first involved the question of the jurisdiction of the Interstate Commerce Commission to regulate the fares of passengers traveling to and from the District of Columbia and certain military establishments in Virginia on the vehicles of Capital Transit Company operated wholly within the District of Columbia. The second issue involved the question whether the Commission, in regulating such fares, had imposed confiscatory rates and divisions thereof.

The attention of the Court, however, as shown by the numerous questions asked of counsel during the oral argument and by the Court's written opinion, was centered on the first issue. In the majority opinion, the issue of confiscation was disposed of in five lines; it was not mentioned in the dissenting opinion.

In ordering the actions in the District Court dismissed on the ground that the record fails to show that the issue of confiscation by the Commission's orders was properly presented to the Commission for its determination, the Court, it is respectfully submitted, erroneously decided a far reaching question of vital importance involving the judicial review of administrative rate regulatory orders. As shown below, this decision is contrary to previous decisions of this Court. We also must respectfully point out that the question of confiscation was presented to the Commission. The uncontradicted evidence adduced by Capital Transit before the Commission showing in detail, the costs of its service involved in the Commission's orders, necessarily raised the question of confiscation by any order of the Commission fixing its revenues in amounts less than such demonstrated costs. (R. 374, 856-857; Ex. 135, R. 934; Capital Transit's Brief, pp. 11-13, 55-58) Furthermore, the question of confiscation, based upon such evidence, was presented and argued in Capital Transit's Brief before the Commission (R. 471-472, 492-494) and in its Exceptions to the Examiner's Report (R. 580-581, 584-585, 593-596). In short, we submit that the question of confiscation by

the Commission's fixing of the Capital Transit compensation at 5.83 cents and 7 cents was in fact presented to the Commission. The Court's opinion does not inform us in what manner the question could have been more adequately raised.

The costs, as shown by Capital Transit's uncontradicted evidence, of furnishing the service required by the Commission's orders were in the amount of 9.968 cents per passenger, which amount did not include any return to Capital Transit. (R. 856-857; Ex. 135, R. 914) Such costs obviously far exceed both the 5.83 cents and the 7 cents compensation to Capital Transit fixed by the Commission's orders. The extreme disparity of these figures demonstrates that the claim made by Capital Transit of the confiscatory nature of the Commission's orders is not frivolous, but, on the contrary, is an issue of substance entitled to serious consideration.

If, despite the presentation of the foregoing evidence and contentions based thereon to the Commission, Capital Transit is now precluded by dismissal of its actions below from seeking and obtaining judicial review of and relief from the Commission's orders, on the basis of confiscation, the constitutional protection afforded by the Fifth Amendment to the Constitution of the United States has lost its meaning for utilities affected by administrative rate regulatory orders which are in fact confiscatory. In no other case that we are aware of involving the application of a constitutional safeguard has this Court, in the absence of statute, so extended the doctrine of the exhaustion of administrative remedies.

It is possible that the Court's brief reference in its opinion to the issue of confiscation may have been influenced by the statutory requirement of the filing of a petition for re-hearing with certain administrative agencies as a prerequisite to a judicial review of their administrative orders. But there is no statutory provision in the Interstate Commerce Act requiring re-hearing by the Com-

mission of a constitutional question prior to bringing action in a court for appropriate relief. In fact, there is no statutory provision requiring any application for re-hearing by the Commission of its own actions prior to review. This Court has held, in an able opinion by Mr. Justice Brandeis, that even the failure to apply for re-hearing of orders of an administrative division of the Commission, as distinguished from orders by the Commission itself, does not require dismissal of an action in the courts to review such orders. *United States* v. *Abilene & S. Ry. Co.*, 265 U. S. 274, 280-282.[1]

In the instant cases, the District Court has found, upon uncontradicted evidence of record, that the Capital Transit compensation fixed by the Commission's orders is in fact confiscatory (R. 172). The Commission's own findings show (R. 136-138), and it is conceded that, the 5.83 cents compensation fixed in the Commission's order of July 7, 1948, was inadequate to meet increased expenses. (Gov't Br. p. 5) Until today no decision of this Court has foreclosed judicial relief from administrative orders under such circumstances. In *Baltimore & O. R. Co.* v. *United States*, 298 U. S. 349, 370-371, this Court specifically affirmed the right of a carrier to invoke the judicial power to obtain constitutional protection against a confiscatory division order by the Commission where no petition for administrative relief had been made prior to bringing the action. The decision in these cases would overrule the considered decision of this Court in the *Baltimore* case, *supra*, without, it is submitted, an adequate consideration of the far reaching effect of such a reversal of the law.[2]

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[1] Section 17(9) of the Interstate Commerce Act was subsequently enacted to correct this situation. (Act of Sept. 18, 1940, c. 722, § 12; 54 Stat. 913) But this legislation does not preclude judicial review for failure to apply for rehearing of decisions by the Commission itself.

[2] The statement in *New York* v. *United States*, 331 U. S. 284, 334-336, did not overrule the *Baltimore* case, *supra*, insofar as the *Baltimore* case is applicable to the instant cases.

The decision in the instant cases, by directing dismissal of the actions below, would leave Capital Transit suffering from clearly confiscatory administrative action during the further proceedings before the Commission to reconsider the same matters already presented, but with all the inevitable delays that will result from such proceedings. Under the Fourteenth Amendment to the Constitution of the United States, this Court has uniformly and zealously guarded the constitutional rights of a utility against confiscatory rate orders becoming or remaining effective pending further state administrative or judicial action. *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 293; *Pacific Telephone & Telegraph Co.* v. *Kuykendall*, 265 U. S. 196, 204-205; *Banton* v. *Belt Line Ry. Corp.*, 268 U. S. 413, 415-417; *Smith* v. *Illinois Bell Telephone Co.*, 270 U. S. 587, 590-592. The decision in these cases denies to Capital Transit the judicial relief under the Fifth Amendment that it would be clearly entitled to under the Fourteenth Amendment. We earnestly request that further consideration be given to this matter before permitting such an anomalous result to become a part of our constitutional law.

2. We also request reconsideration of the issue of jurisdiction. In deciding this issue, the Court has apparently overlooked an important contention advanced by counsel as to the meaning and proper application of the proviso to Section 216(e) of the Interstate Commerce Act (49 U. S. C. § 316(e)). (See Capital Transit's Brief, pp. 29-34.) The consequence is, we respectfully submit, an erroneous decision as to the statutory limitations on the Commission's authority under this proviso.

The Court's opinion erroneously assumes that the application of the proviso was contended for, considered, and rejected in *United States* v. *Capital Transit Co.*, 325 U. S. 357, in the same manner as its application was contended for here. But the contentions made in these cases (Capital Transit's Brief, pp. 29-34) were not and could not have been made in the prior case because it was not

until the Commission issued its Order of July 7, 1948, attacked in this case, that the Commission fixed and prescribed the Capital Transit compensation for its service wholly within the District of Columbia. It is this fixing of the Capital Transit compensation of 5.83 cents and 7 cents out of the 13⅓ and 16 cent joint fares, respectively, which we contend violates, for the first time, the specific statutory limitations on the Commission's rate regulatory authority under the proviso to Section 216(e) of the Act.[3] Those limitations are applicable to prohibit the fixing of such compensation for such intra-District service even though it is assumed or held, as in the Court's opinion, that such Capital Transit service is an integral part of an interstate movement. Thus, the Court's opinion does not reach this decisive question.

3. It is respectfully urged that this petition for re-hearing be granted; and that the Court withhold its mandate, pending final action on this petition for re-hearing, to prevent irreparable injury to Capital Transit Company.

Certificate of Counsel.

We, counsel for the Appellee, Capital Transit Company, do hereby certify that the foregoing petition for re-hearing in these cases is presented in good faith, and not for delay.

Respectfully submitted,

EDMUND L. JONES,
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Attorneys for Appellee, Capital Transit Company.

November, 1949

[3] The only contention based on the proviso advanced and considered in the prior case related to the power of the Commission to apply the local District fares of Capital Transit to its then existing trans-Potomac service directly to the Virginia installations. (Appellee's Brief, No. 663, Oct. Term, 1944, pp. 43 *et seq.*; Capital Transit's Petition for Rehearing, No. 663, Oct. Term, 1944, pp. 3-4; see Capital Transit's Brief, *these cases*, p. 47, footnote 12).

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Nos. 40 and 41

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1949

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

CAPITAL TRANSIT COMPANY, ET AL., *Appellees*,

WASHINGTON, VIRGINIA & MARYLAND COACH COMPANY, INC., ET AL., *Appellants*,

v.

CAPITAL TRANSIT COMPANY, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING

VERNON E. WEST,
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1949

No. 40

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

CAPITAL TRANSIT COMPANY, ET AL., *Appellees*.

No. 41

WASHINGTON, VIRGINIA & MARYLAND COACH COMPANY, INC., ET AL., *Appellants*,

v.

CAPITAL TRANSIT COMPANY, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING

The appellee, Public Utilities Commission of the District of Columbia, respectfully petitions the Court to grant a

rehearing in the above-entitled cases, and in support thereof, states:

1. To the extent that the Court's opinion of November 14, 1949, rests upon its decision in *U. S. v. Capital Transit Company*, 325 U. S. 357, this appellee believes the Court was of the erroneous view that the decision in 325 U. S. was predicated upon a determination of the applicability of the proviso in Section 216 (e) of the Interstate Commerce Act (49 U. S. C. §316 (e)). In the opinion of November 14, 1949, the Court stated the Transit Company contended in *Capital Transit* case, *supra*, that jurisdiction of the Federal Commission was precluded by the proviso in Section 216 (e), and that this Court rejected such contention.

The decision of this Court in 325 U. S. shows that Transit Company contended that the Federal Commission was without jurisdiction under Section 203 (b) (8) (49 U. S. C. §203 (b)), and this Court held that the said section "provided the controlling rule" (p. 360). A reading of the opinion shows that no decision was reached as to the application of the proviso of Section 216 (e) to the transportation involved in that case.

The contention in Cases Nos. 40 and 41, is that the proviso in Section 216 (e) is applicable because all of the transportation performed by Transit Company is "intrastate transportation" This appellee believes that the Court should make a determination of the applicability of the proviso in Section 216 (e) to transportation that is exclusively "intrastate transportation".

2. The decision of November 14, 1949, seems to be predicated upon the necessity of Federal regulation of the "stream of commerce" between the District of Columbia and the so-called defense installations in Virginia. At page 363, of the *Capital Transit Company* case, *supra*, this Court cited the volume of the "stream of commerce" shown in the findings of the Federal Commission in its 1944 orders. The

Federal Commission made no finding of the continuous flow of commerce between the District of Columbia and the Virginia installations in its order of July 7, 1948. The only finding it made in respect to the flow of commerce was the number of passengers transported by the Alexandria, Barcroft & Washington Transit Company. (R. 135-136). In the report of July 7, 1948, the Federal Commission made a finding of a large area known as Arlington Farms, containing dormitories occupied by Government employees, and other installations "erected since the prior hearings". It also found "There are certain other intermediate stops in this area". (R. 134)

The Federal Commission did not predicate its jurisdiction upon the stream of commerce, but, rather, upon the needs of National Defense. A decision predicated upon the continuous flow of commerce must, of necessity, be predicated upon the record made and the findings of the Federal Commission in the proceedings of 1944, rather than upon the proceedings upon a further hearing resulting in the order of July 7, 1948.

3. The statement in the opinion of November 14, 1949, that appellees pointed out that there are now fewer Army and Navy workers who work in the Virginia installations, indicates a misunderstanding of the contention made in respect of the number of passengers moving interstate. The argument of this appellee in this respect was for the purpose of showing that a great majority of the passengers traveling interstate, between the District of Columbia and Virginia, were not engaged in National Defense, and that the establishment of joint fares, insofar as they applied to such passengers, was not in aid of the needs of National Defense. The establishment of a special fare to such passengers constitutes a preference and advantage to those passengers, and a preference and advantage to the four points in Virginia, and a discrimination against, and a disadvantage to, all other passengers making interstate trips

going to other places than the four Virginia installations, in violation of Sec. 216 (e) of the Act (49 U. S. C., Sec. 316 (e)). (See District Commission Brief, pp. 4-5 and 9-10; also R. 532-533 and 538).

In the Decision of November 14, 1949, this Court said that neither this point nor the argument that the record did not support the basis of the Federal Commission's determination is not sufficient to justify setting aside findings made by the Federal Commission on this point. The only finding made by the Federal Commission on this point was the finding in the 1944 proceedings. This Court found in 325 U. S., at p. 361, that the interstate rates established in the 1944 orders of the Federal Commission "applied almost exclusively to workers engaged in National Defense", and, at page 362, that these employees worked in the very center of activities essential in conducting a war. The Federal Commission made no such findings in its order of July 7, 1948.

4. The Court's decision that the Transit Company's intra-District street car and bus transportation of passengers going to and from the Virginia establishments is an integral part of an interstate movement fails to distinguish between the *service* of a common carrier and the *trip* of the passengers involved. This distinction is clearly made in *U. S. v. Yellow Cab Company*, 332 U. S. 218.

5. This appellee respectfully shows that the matter of confiscation was squarely presented to the Federal Commission, and references were made to that subject in the District Commission's Brief at pages 48-49 and 53-54.

6. It is respectfully urged that the matter of the jurisdiction of the Federal Commission over intrastate transportation is of such great national interest that a rehearing should be granted, and that this Court should withhold its mandate in these cases pending action on this Petition for Rehearing.

CERTIFICATE OF COUNSEL

We, Counsel for the Appellee, Public Utilities Commission of the District of Columbia, do hereby certify that the foregoing Petition for Rehearing in Cases Nos. 40 and 41, is presented in good faith and not for delay.

Respectfully submitted,

VERNON E. WEST,

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Attorneys for Appellee,
Public Utilities Commission of the District of Columbia,
District Building.